No. _____

In the Supreme Court of the United States

FAMILY FARE, INC., d/b/a GLEN'S MARKET,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Sixth Circuit Court of Appeals deprive Petitioner of its equal protection rights when it issued an unpublished decision that directly conflicts with and overrules its prior published decisions without granting *en banc* review as required by its own Circuit Rule 206?

2. Did the Sixth Circuit Court of Appeals deprive Petitioner of procedural due process when it issued an unpublished opinion that directly conflicts with and overrules its prior published decisions without granting *en banc* review as required by its own Circuit Rule 206?

3. Did the Sixth Circuit Court of Appeals exceed its authority and exercise non-judicial power in violation of Article III of the Constitution when it issued, against Petitioner, an unpublished opinion that carries no precedential weight?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Respondent-Cross-Petitioner: Family Fare, LLC d/b/a Glen's Market.

Petitioner-Cross-Respondent: The National Labor Relations Board.

RULE 29.6 STATEMENT

Family Fare LLC, d/b/a Glen's Market, is a Michigan corporation and a subsidiary of Spartan Stores Holding, Inc. which is a subsidiary of Spartan Stores, Inc., a publicly owned company incorporated under the laws of the State of Michigan.

There are no other publicly held companies or parent corporations owning 10% or more of Family Fare LLC's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Family Fare, LLC ("Family Fare") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals was issued on November 13, 2006 in Case Numbers 05-2378 and 05-2461 and is available at 205 Fed. App'x 403 (2006). App., *infra,* 3a-21a. The court of appeals decision was unpublished pursuant to Sixth Circuit Rule 206. The Sixth Circuit Court of Appeals also issued orders denying the National Labor Relations Board's motion to publish the court's opinion on December 14, 2006 and denying Family Fare's petition for rehearing with a suggestion for *en banc* review on February 15, 2007. App., *infra*, 1a-2a, 31a.

The decisions of the National Labor Relations Board are reported at 344 NLRB No. 25 (2005) and 344 NLRB No. 100 (2005).

JURISDICTION

The Sixth Circuit Court of Appeals' decision and opinion was entered on November 13, 2006. The Sixth Circuit denied a timely petition for rehearing on February 15, 2007. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, § 1.

"* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const. amend. V.

"No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. Const. art. III, § 1.

"Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

29 U.S.C. § 157 (Section 7 of the National Labor Relations Act)

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . ."

Other relevant provisions of the National Labor Relations Act and NLRB regulations are set forth in the appendix. App., *infra,* 85a-105a.

6th Cir. R. 206. (App., *infra*, 106a-07a.)

* * *

(b) Designation for Publication. An opinion or order shall be designated for publication upon the request of any member of the panel.

(c) Published Opinions Binding. Reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court *en banc* consideration is required to overrule a published opinion of the court.

STATEMENT OF THE CASE

The Sixth Circuit Court of Appeals' unpublished decision in this case directly conflicts with and overrules prior published authority of that court in violation of the Circuit's own rule. 6th Cir. R. 206. This unpublished panel decision, coupled with the court's refusal to rehear the case under the correct controlling authority or to grant *en banc* review, has violated Petitioner's constitutional rights to equal protection and procedural due process.

The controlling authority at issue concerns the legal standards to be applied in cases where employers challenge the validity of a union election based on objectionable conduct by statutory supervisors under the National Labor Relations Act ("NLRA").

That the panel's unpublished decision directly conflicted with the Sixth Circuit's binding published standard for determining whether supervisors engaged in objectionable conduct and interfered with employee rights to a free and fair election under the NLRA cannot be disputed:

> **The Sixth Circuit's Published Opinions:** "*The party challenging the election need not introduce proof of actual coercion.*" *Harborside Healthcare, Inc. v. NLRB*, 230 F.3d 206, 210 (6th Cir. 2000) (emphasis in original); *Evergreen Healthcare, Inc. v. NLRB*, 104 F.3d 867, 874 (6th Cir. 1997).
>
> **The Sixth Circuit's Unpublished Opinion:** "[S]ome showing of coercion is required to sustain a finding of objectionable conduct." App., *infra*, 13a.

Like the other federal circuits, the Sixth Circuit has a rule that prohibits a panel of the court from overruling prior published authority without granting *en banc* review. Sixth Circuit Rule 206(c) provides:

> Reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court *en banc* consideration is required to overrule a published opinion of the court.
>
> 6th Cir. R. 206(c) (emphasis added).

Under this and similar "no panel overruling" rules, a circuit court has two and only two options: (1) it may follow and apply prior published authority in the case before it (which then permits the court to issue either a published or unpublished decision); or (2) it may alter such prior binding

authority after considering the matter *en banc*.[1] By rule, the court may not issue an unpublished decision that overrules or modifies prior published authority. Doing so, as the Sixth Circuit has done here, violates the litigants' equal protection and due process rights.

Review by this Court is required to protect the parties' constitutional rights and to provide guidance to all Circuit Courts of Appeal that face the problem of panel decisions that circumvent binding published authority in conflict with their own rules.

This case also warrants review because it involves new, critical, and far-reaching principles of federal labor law, and the important rights of employees to vote in a free and fair election under the National Labor Relations Act ("NLRA"). The Sixth Circuit's unpublished decision not only deprives Petitioner of its constitutional rights, but also denies voting employees their fundamental statutory right to participate in a union election free from supervisory misconduct that "reasonably tends" to have a coercive effect on their freedom of choice. 29 U.S.C. § 157; *Harborside Healthcare, Inc.*, 230 F.3d at 210.

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[1] Of course in following prior published authority a panel that takes issue with prior decisions may suggest that the court review the relevant legal principles *en banc*. *E.g.*, *Michigan Family Res., Inc. v. Serv. Employees Int'l Union*, 438 F.3d 653, 658 (6th Cir. 2006) (Sutton J., concurring) (suggesting that the circuit's four-part test for reviewing labor arbitration awards was inconsistent with Supreme Court decisions and that the court should revisit the issue *en banc*), *rev'd en banc*, 475 F.3d 746 (6th Cir. 2007). This approach recognizes the court's binding "no panel overruling" rule and does not violate equal protection or due process rights.

Section 7 of the NLRA protects employees' rights "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing," and their rights "to refrain from . . . such activities." 29 U.S.C. § 157. Congress has expressly identified "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing" as a fundamental policy behind the NLRA, and the Board has a statutory duty to protect employees' rights to select their own representatives in an atmosphere free from objectionable conduct and improper supervisory pressure. *See* 29 U.S.C. § 151; *NLRB v. Superior Prot., Inc.*, 401 F.3d 282, 288 n.8 (5th Cir. 2005), *citing Pan Am. Grain Co.*, 317 NLRB 442, 447 (1995).

Statutory supervisors in this case initiated a union organizing drive at a grocery store, solicited employees to sign union authorization cards, and pressured employees to support the union. Because the Sixth Circuit impermissibly modified the standard for determining whether the supervisors' conduct was sufficiently objectionable to interfere with the employees' Section 7 rights to a free and fair election, the employees were also denied equal protection of the law. The Sixth Circuit has subjected the election here to a legal standard different than the one that applies in every other comparable union election case in the Sixth Circuit.

The NLRB's General Counsel has acknowledged the importance of this case to federal labor policy by filing a motion asking the Sixth Circuit to publish its opinion. App., *infra*, 22a-24a. In that motion, the General Counsel recognized that the court's ruling was a significant change from prior Sixth Circuit decisions, explaining that the panel's unpublished decision "sets a framework for addressing an

issue of considerable importance to the labor bar and provides much-needed guidance on a new approach to what previously [has] been an area of dispute between the Board and [the Sixth Circuit]." App., *infra*, 23a (emphasis added).

Factual Background. Family Fare, LLC d/b/a Glen's Market, is a Michigan corporation and a subsidiary of Spartan Stores Holding, Inc. Family Fare operated 56 retail grocery stores in Northern and Western Michigan during the relevant times in question, including the store at issue in this case.

In mid-October 2001, two statutory supervisors from an Oscoda, Michigan Glen's Market engaged in improper pro-union activity by initiating and leading a union organizing drive. App., *infra*, 5a-6a. The supervisors' pro-union activities gave rise to the parties' dispute on whether the secret ballot election at the store was free from coercion and supervisory taint under the NLRA. At issue in the court below was whether the admitted improper conduct of two statutory supervisors, including direct solicitation of union authorization cards from store employees, constituted objectionable conduct that prevented a free and fair election under Section 9 of the NLRA.

Prior to the January 18, 2002 Board election, the Bakery and Deli Managers at the Glen's Market store in Oscoda engaged in improper pro-union conduct which included, *inter alia*, holding meetings at their homes, approaching other employees and asking them to fill out union authorization cards, pressuring other employees to support the union, speaking about the union so frequently in an employee break area that other employees took breaks elsewhere, and visiting employees at their homes to discuss the union without invitation. App., *infra*, 45a-46a; JA 352-58, 365-68, 371-72,

and 400.[2] These supervisors managed approximately 25% of the voting employees, JA 168, 246. Family Fare, LLC has properly maintained throughout this litigation that the evidence of supervisory taint and other inappropriate conduct in the record "reasonably tended" to have a coercive effect on employees' freedom of choice in the election and that a new election is required under controlling legal authority. *Harborside Healthcare, Inc.*, 230 F.3d at 210.

In fact, there is no dispute that both supervisors solicited union authorization cards from employees between October 2001 and the election in January 2002—conduct that the Board has since repeatedly found to be inherently coercive absent mitigating circumstances, and sufficient to require a new election to protect employees' statutory rights to a free and fair election. *E.g.*, *SNE Enters., Inc.*, 348 NLRB No. 69 (2006); *Chinese Daily News*, 344 NLRB No. 132 (2005).

Following a close election (where the outcome would have been different with a change in just four votes), Family Fare filed objections to conduct that improperly affected the election with the Board. JA 115. A hearing officer overruled the objections. JA 167-72.

Family Fare appealed the hearing officer's decision to the NLRB again arguing, *inter alia*, that the managers had engaged in widespread coercive conduct that tainted the employees' free choice and required a new election. JA 174-90. The company also argued that the admitted solicitation of union authorization cards by the two supervisors was, in

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[2] "JA" refers to the Joint Appendix filed with the Sixth Circuit Court of Appeals.

itself, compelling evidence of coercive objectionable conduct requiring a new election. JA 188-89.

On February 22, 2005, the Board overruled the company's objections and certified the union as the exclusive bargaining representative for a stipulated bargaining unit of grocery store employees. App., *infra*, 43a-50a. Thereafter, the NLRB initiated unfair labor practice proceedings based on a charge alleging that the company was refusing to bargain in violation of the Board's February 22, 2005 order. On June 10, 2005, the NLRB issued a second order finding that the company violated Section 8(a)(5) of the NLRA and directed the company to bargain with the union. App., *infra*, 33a-42a. This order was required to trigger jurisdiction by petition to the federal courts of appeal under 29 U.S.C. § 160. *E.g., Harborside Healthcare, Inc.*, 230 F.3d at 208 n.2.

The Sixth Circuit's Decision. On review of the Board's petition to enforce its June 10, 2005 order and Family Fare's cross-petition for review, the Sixth Circuit granted enforcement in an unpublished decision issued by a three-judge panel on November 13, 2006. App., *infra*, 3a-21a.

The court's unpublished opinion directly conflicts with prior published authority from the Sixth Circuit, fails to follow controlling decisions from this Court, and exceeds its authority by unnecessarily limiting an NLRB decisional rule that, as stated by the panel, is in direct conflict with a decision of the NLRB.

First, as noted above, the panel decision applied a legal standard for determining objectionable conduct under the NLRA that directly conflicts with prior published Sixth Circuit decisions.

The court incorrectly held that Family Fare was required to make a showing of actual coercion.

- In the panel's words: "some showing of coercion is required to sustain a finding of objectionable conduct" by a statutory supervisor during a union election campaign. App., *infra,* 13a (emphasis added).

- But repeated published Sixth Circuit cases have ruled that "[t]he party challenging the election need not introduce proof of actual coercion." *Harborside Healthcare, Inc. v. NLRB*, 230 F.3d 206, 210 (6th Cir. 2000) (emphasis in original); *Evergreen Healthcare, Inc. v. NLRB*, 104 F.3d 867, 874 (6th Cir. 1997).

The unpublished opinion impermissibly contradicts and modifies the standard previously established in the court's published cases. Thus, it violates the Sixth Circuit's rule that prevents a panel from overruling prior published precedent. 6th Cir. R. 206; *see also Sam & Ali, Inc. v. Ohio Dep't of Liquor Control*, 158 F.3d 397, 405 (6th Cir. 1998) (Krupansky, J., concurring); *United States v. Jones*, 445 F.3d 865, 873 (6th Cir. 2006) (Moore, J., dissenting) ("this panel is not at liberty to contradict the law of this circuit as previously decided by a unanimous panel of this court") (emphasis added).

Second, the panel's decision improperly relied on a speculative and unstated rationale to affirm the Board's decision. It is well settled that a federal court of appeals may not speculate on the Board's unstated or unexplained rationale when reviewing administrative determinations. *NLRB v. Metro. Life Ins., Co.*, 380 U.S. 438, 443-44 (1965); *Comcast Cablevision-Taylor v. NLRB*, 232 F.3d 490, 497 (6th Cir.

2001). Here, the Board assumed supervisory status for the managers but did not analyze *how* the nature or degree of supervisory authority impacted the analysis or conclusion in its published ruling. App., *infra*, 46a-49a. Nevertheless, the Sixth Circuit panel made its own speculative inquiry into the nature and degree of the managers' authority to support its decision, contradicting its own (and this Court's) prior binding precedent. App., *infra*, 16a-17a.

Third, the Sixth Circuit panel altered and failed to apply the correct NLRB rule on union card solicitations. The Board has repeatedly held that solicitation of union authorization cards by supervisors is inherently coercive absent mitigating circumstances. The court's decision, however, held that the NLRB's rule presuming coercion absent mitigating circumstances applies "only where the supervisors at issue possess sufficiently broad and meaningful authority." App., *infra*, 19a.

The court thus altered the Board's new rule on solicitation of union cards by adding a significantly broad and meaningful "level of authority" requirement to the analysis. This new purported requirement is not supported by published Board decisions. In fact, the Sixth Circuit modified the Board's rule despite Family Fare's repeated citation to the Board's decision in *SNE Enterprises, Inc.* where the NLRB rejected a claim by a Regional Director that the coercive nature of union card solicitations was mitigated by a "lack of power to significantly affect the working lives of employees." *SNE Enters., Inc.*, 348 NLRB No. 69, *2 (2006).

The panel below heard oral argument in this case on September 21, 2006, and the Board decided *SNE Enterprises, Inc.* 348 NLRB No. 69 on October 31, 2006. Family Fare immediately brought the Board's new authority to the Sixth

Circuit's attention on November 6, 2006, pursuant to Federal Rule of Appellate Procedure 28(j). App., *infra*, 109a-111a. Yet the panel's decision failed to address or even mention this case. In fact, the panel added a requirement to the Board's rule that contradicts the Board's *SNE* decision. The Sixth Circuit also failed to address this issue in deciding Family Fare's petition for rehearing.

In this respect, the court's decision refuses to defer to the Board's card solicitation rule which does not require broad and meaningful supervisory authority. The court failed to follow a rule which is rational and consistent with the NLRA and again refused to follow prior binding authority. *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 364 (1998); *Mid-America Care Found. v. NLRB*, 148 F.3d 638, 643 (6th Cir. 1998).

Proceedings Following the Decision Below. Family Fare identified these fundamental defects in its petition for rehearing with a suggestion for rehearing *en banc*. The Sixth Circuit, however, did not grant *en banc* review, denied the petition, and offered no explanation for its obvious departure from prior authority. Instead, the court issued a one-page short form order denying rehearing where it stated that "the issues raised in the petition were fully considered" upon the original submission of the case. App., *infra*, 1a-2a.

The court offered no explanation for its failure to follow its own prior published precedent. Nor did it explain how the panel could have "fully considered" the issues raised by Family Fare in its rehearing petition "upon original submission" when the issues raised in the petition for rehearing were based on the court's errors that were unknown until the panel issued its unpublished decision. It was simply impossible for the panel to have done what it states.

It is also impossible to know how the court would have ruled had it applied the correct legal standards as set forth in prior binding published decisions of the Sixth Circuit. The parties cannot, and are not required to, speculate in this regard. The Court should remand the case for *en banc* review by the Sixth Circuit or for reconsideration under the correct controlling legal authority.

The panel's significant departure from prior published Sixth Circuit law is underscored by the General Counsel's November 27, 2006 motion asking the court to publish its opinion. The General Counsel for the Board recognized that the panel's decision rested on a "new approach" for examining objectionable conduct by pro-union supervisors under the NLRA. General Counsel further acknowledged that the unpublished opinion "sets a framework for addressing an issue of considerable importance to the labor bar and provides much-needed guidance on a new approach to what previously [had] been an area of dispute between the Board and [the Sixth Circuit.]" App., *infra*, 23a (emphasis added).

Courts of appeals in other federal circuits with "no panel overruling" rules will face similar problems with panel decisions that circumvent the doctrine of *stare decisis* as reflected in those binding rules. As explained below, the Sixth Circuit has deprived the litigants in this case of their fundamental constitutional rights. The Court should review this case to protect these fundamental rights and to issue guidance for all Courts of Appeal with similar "no panel overruling" rules.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit Deprived Petitioner of Equal Protection When It Issued an Unpublished Decision that Applied Legal Standards in Direct Conflict With Those in Prior Published Decisions Without Granting *En Banc* Review.

The Equal Protection Clause of the Constitution "commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). The constitutional guarantee of equal protection applies equally to the federal government. *See Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) ("it would be unthinkable that the same Constitution would impose a lesser duty on the federal government"). "The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.'" *Skinner v. Okla. ex rel. Williams*, 316 U.S. 535, 541 (1942). Petitioner was denied protection of equal laws when the Sixth Circuit refused to follow its own rule or prior published precedent.

A. This Case Involves Fundamental Principles of *Stare Decisis* and "No Panel Overruling" Rules Adopted by All of the Circuit Courts of Appeals.

"*Stare decisis*" is short for *stare decisis et non quieta movere*, which means "stand by the thing decided and do not disturb the calm." Federal courts "have always required a departure from precedent to be supported by some 'special justification.'" *United States v. Int'l Bus. Mach. Corp.*, 517 U.S. 843, 856 (1996), *quoting Payne v. Tennessee*, 501 U.S. 808, 842 (1991) (Souter, J., concurring). In keeping with this

tradition, all federal circuits have enacted or adopted strict "no panel overruling" rules. These rules reflect a strong notion of *stare decisis* and bind panels to prior published rulings unless the circuit court of appeals revisits the issues *en banc*.[3] *See* Amy Coney Barrett, Stare Decisis and Due Process, 74 U. COLO. L. REV. 1011, 1018 and 1044 (2003) (noting the rigidity that comes from "the rule, followed in every circuit, that one panel cannot overrule another" and that these rules "set most circuit law in relative stone"). Such is the case with Sixth Circuit Rule 206(c) which provides that "reported panel opinions are binding on subsequent panels," and *en banc* review "is required to overrule a published opinion of the court." 6th Cir. R. 206(c).

The purpose of Sixth Circuit Rule 206 and other "no panel overruling" rules is to maintain *stare decisis* and promote "fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a

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[3] Some circuits have adopted these so-called "no panel overruling" rules by rule or procedure and others by case law. *See, e.g., Bath Iron Works Corp. v. Dir., Office of Workers' Comp. Programs*, 136 F.3d 34, 40 (1st Cir. 1998); *Woodling v. Garrett Corp.*, 813 F.2d 543, 557 (2d Cir. 1987); *Abdulai v. Ashcroft*, 239 F.3d 543, 553 (3d Cir. 2001); 3d Cir. I.O.P. 9.1; *Norfolk & West. Ry. Co. v. Dir., Office of Worker's Comp. Programs*, 5 F.3d 777, 779 (4th Cir. 1993); 6th Cir. R. 206(c); *Dir., Office of Workers' Comp. Programs v. Peabody Coal Co.*, 554 F.2d 310, 333 (7th Cir. 1977); *Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1297 (8th Cir. 1994); *In re Osborne*, 76 F.3d 306, 309 (9th Cir. 1996); *United States v. Meyers*, 200 F.3d 715, 720 (10th Cir. 2000); *United States v. Steele*, 147 F.3d 1316, 1317-18 (11th Cir. 1998) (*en banc*); *Thompson v. Thompson*, 244 F.2d 374, 375 (D.C. Cir. 1957); *LaForte v. Horner*, 833 F.2d 977, 980 (Fed. Cir. 1987).

source of impersonal and reasoned judgments." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970) (emphasis added); *accord McGinley v. Houston*, 361 F.3d 1328, 1331 (11th Cir. 2004) (discussing the "no panel overruling" rule in the Fifth and Eleventh Circuits).

"The United States federal legal system is structured as a common law system," and "[t]his system 'embodies the rule of *stare decisis* that 'courts should not lightly overrule past decisions. . . .'" *McGinley*, 361 F.3d at 1331, *quoting Moragne*, 398 U.S. at 403. "Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law." *Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir. 2000) (vacated as moot on unrelated grounds), *citing Marbury v. Madison*, 5 U.S. 137, 147 (1803). These declarations "must be applied in subsequent cases to similarly situated parties." *Anastasoff*, 223 F.3d at 900, *citing James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544 (1991).

This doctrine of precedent is not simply the common law tradition inherited from England, but it serves the contemporary and vital purpose of ensuring due process by protecting contemporary litigants from arbitrary decisions and preventing the courts from exercising anything other than the judicial power to determine laws, instead of the legislative power to create laws. *See Anastasoff*, 223 F.3d at 901. Thus a system of *stare decisis* is a necessary and vital part of due process and the fair adjudication of claims.

B. The Sixth Circuit's Unpublished Decision Modified and Overruled Prior Published Legal Standards in Violation of Circuit Rule 206.

There are two factors that the Board and Courts in the Sixth Circuit examine when determining if a supervisor's pro-union conduct upsets the conditions for a free and fair election. This case involves the first step only, i.e. whether the conduct "reasonably tended" to coerce or interfere with the employee's exercise of free choice. In *Harborside Healthcare, Inc. v. NLRB*, 230 F.3d 206, 210 (6th Cir. 2000), the Sixth Circuit examined and settled the law regarding the first factor. It explained:

> An election will be invalidated when the petition demonstrates ~~that~~ "the supervisor's conduct reasonably tended to have such a coercive effect on the employees that it was likely to impair their freedoms of choice in the election." *The party challenging the election need not introduce proof of actual coercion.*

Id., *quoting Evergreen Healthcare, Inc.*, 104 F.3d at 874. The *Harborside* Court remanded the case before it because the Board's decision rested on an incorrect notion that the pro-union conduct had to be threatening and coercive. On remand, the NLRB adopted the Sixth Circuit's approach. *Harborside Healthcare, Inc.*, 343 NLRB 906, 909 (2004) (the first prong of the NLRB's test "mirrors the Sixth Circuit's standard").

The panel, however, ruled that "*some showing* of coercion is required." This ruling openly departed from the settled

Sixth Circuit law quoted above. *Compare* App., *infra*, 13a, *with Evergreen Healthcare*, 104 F.3d at 874.[4]

The panel also contradicted controlling authority from this Court that precludes a federal court of appeals from considering unstated or unexplained agency rationale when reviewing an administrative determination under the substantial evidence standard. *Metro. Life Ins., Co.*, 380 U.S. at 443-44; *Comcast Cablevision-Taylor*, 232 F.3d at 497.

The panel improperly relied on a speculative and unstated rationale to affirm the Board's decision. Although the Board assumed supervisory status for the managers, it did not analyze or explain what role the nature or degree of their supervisory authority actually played in its conclusion. There is no basis to conclude how, or if, the Board evaluated the nature and degree of authority. App., *infra*, 46a-49a. Nevertheless, the Sixth Circuit panel made its own inquiry into the nature and degree of the managers' authority to support its decision, thereby contradicting its own (and this Court's) prior binding precedent. App., *infra*, 16a-17a. In addition, after examining the degree of supervisory authority, the panel compounded its error by adding a requirement to the NLRB's rule on union card solicitations that directly conflicts with the Board's published case in *SNE Enterprises, Inc.*, 348 NLRB No. 69 (2006).

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[4] Rather than applying the established law in the Sixth Circuit and NLRB precedent, the panel cites *Millard Refrigerated Serv.*, 345 NLRB No. 95 (2005) and *Werthan Packaging*, 345 NLRB No. 30 (2005) in support of its improper conclusion. Significantly, neither holds that a showing of actual coercion is required.

C. The Sixth Circuit's Arbitrary Refusal to Apply Binding Published Authority in the Case Below Violates its Own Rule and Cannot Survive Strict Scrutiny.

Although the general rule is that "legislation [or a local court rule] is presumed to be valid and will be sustained if the classification . . . is rationally related to a legitimate state interest," and thus survives minimum scrutiny, a federal law that impinges upon a right conferred in the Constitution, such as the freedom of speech or fair access to the courts, must survive heightened or "strict" scrutiny. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 101 (1972) ("[t]he Equal Protection Clause requires the statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives"); *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1076 (1991) (holding that the constitutionality of the state bar rule must be "narrowly tailored" and be supported by a "substantial state interest"). Because the Sixth Circuit panel's failure to comply with Rule 206 impacts Petitioner's fundamental rights to equal protection, due process, and a fair adjudication of claims under the Fifth Amendment, its actions in issuing the unpublished decision must survive strict scrutiny.

Here, the unpublished opinion directly contradicts and modifies prior, published Sixth Circuit decisions, subjecting the litigants in this case to a different standard and depriving them of their constitutional right to equal protection under the laws.

Sixth Circuit Rule 206 protects litigants from arbitrary decisions that may deprive individuals of "life, liberty, or property" by requiring an *en banc* review of decisions that reject or overrule prior (published) decisions of the court. As

a result, "[n]o legal authority empowers [a Sixth Circuit] panel to reconsider, reverse, overrule, or modify the legal pronouncements of a prior published opinion of" the circuit, unless "altered by a decision of the United States Supreme Court or by the Sixth Circuit sitting *en banc*." *Sam & Ali, Inc.*, 158 F.3d at 405 (Krupansky, J., concurring); *see also Jones*, 445 F.3d at 873 (Moore, J., dissenting) ("this panel is not at liberty to contradict the law of this circuit as previously decided by a unanimous panel of this court").

The rule provides that only "reported panel opinions are binding on subsequent panels." 6th Cir. R. 206(c). An unreported opinion is *per se* incapable of overruling or modifying a prior published opinion. Thus, an unpublished opinion that directly contradicts a prior published decision simply cannot issue under this rule in the absence of *en banc* review. A major loophole exists, however, when as in this case, a panel issues an unpublished decision that modifies prior controlling published authority in violation of Circuit Rule 206 but refuses to review the case *en banc*. Under these circumstances, a panel of the Sixth Circuit, with or without intent, side-steps the well established system of *stare decisis* and the Sixth Circuit's own procedure for modifying or overruling published decisions.

Here, the Sixth Circuit panel was on clear notice, from both parties, that its opinion altered existing published authority. Family Fare provided notice by filing its petition for rehearing raising these issues, and the General Counsel filed a motion asking the court to publish its decision which adopted a "new approach" to examining objectionable conduct by statutory supervisors. The Sixth Circuit, however, did not modify its opinion to comport with prior precedent or grant *en banc* review. Instead, it has simply allowed its unpublished decision to control the rights of the

parties in this case in violation of Sixth Circuit Rule 206 and Petitioner's constitutional rights.

There is simply no compelling state interest in applying different legal standards to different litigants based on whether their case is published or not. The Sixth Circuit's actions and opinion as issued in this case cannot survive strict scrutiny.

D. The Sixth Circuit's Arbitrary Refusal to Apply Prior Published Authority is Not Rationally Related to Any Legitimate Government Interest.

Putting aside its impact on fundamental rights, the Sixth Circuit's refusal to follow binding precedent as required by its own rule cannot survive even minimal scrutiny because there is no rational relation to any legitimate government interest. *Romer v. Evans*, 517 U.S. 620, 631-32 (1996).

The Sixth Circuit may not arbitrarily treat a litigant differently than similarly situated parties by issuing an unpublished panel opinion that overrules prior published authority yet escapes *en banc* review in a particular case. By making such a case unpublished, the court avoids its obligation either to expressly describe why it was not required to follow prior published precedent or examine the issue *en banc* before overruling its own prior authority. In other words, the Sixth Circuit can face a situation, determine what the law is, and issue a published opinion affecting the rights of the parties before it and establishing a rule for future litigants. If, however, a subsequent panel overrules or modifies the published opinion in a second unpublished opinion that escapes *en banc* review, the court unequally affects the rights of similarly situated litigants.

When a panel decides not to publish this second opinion in conflict with prior published authority and the decision is not considered *en banc*, the Sixth Circuit deprives the litigants of the very system that it instituted to prevent such arbitrary decision-making. This course of action avoids binding future litigants, thereby cutting off any further review of the court's underground opinion that conflicts with its published cases.

It is constitutionally impermissible for the Sixth Circuit to issue a decision that overrules prior published authority without *en banc* review as required by Rule 206. It treats similarly situated litigants differently without any rational basis. Indeed, it creates a separate and contrary rule for those individuals whose fate is decided in an "unpublished" decision. *Romer*, 517 U.S. at 633 (1996) ("Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.")

The panel in this case was required either to follow the prior published cases that do not require a party to show actual coercion to establish objectionable conduct warranting a new union election, or to submit the decision for *en banc* review before altering this standard. The court was without authority to enter the opinion as written and improperly refused, when asked in a petition for rehearing, to vacate or modify the decision under the correct controlling standard. App., *infra*, 1a-2a. As a result, the Sixth Circuit violated the Petitioner's constitutional rights to equal protection.

II. The Sixth Circuit Denied Petitioner Procedural Due Process By Issuing an Unpublished Decision that Directly Conflicts With and Overrules Prior Published Decisions Without Granting *En Banc* Review.

The Court should grant this petition and remand the case to the Sixth Circuit for *en banc* review or rehearing because Petitioner has also been deprived of its right to procedural due process. In fact, the Sixth Circuit deprived Petitioner of the very procedural due process put in place by that court to protect parties from arbitrary decisions and to reinforce the system of *stare decisis*.

The government violates a party's right to procedural due process when it deprives the party of a property or liberty interest without due process of law. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *see also Warren v. City of Athens*, 411 F.3d 697, 708 (6th Cir. 2005). To establish a procedural due process violation, a party must first demonstrate that it "possessed a protected property or liberty interest and was deprived of that interest." *Warren*, 411 F.3d at 708. First Amendment rights are a protected "liberty interest," which cannot be deprived without due process. *Procunier v. Martinez*, 416 U.S. 396, 418-19 (1974) (First Amendment right to uncensored communication was "a liberty interest"), *overruled on different grounds by Thornburg v. Abbot*, 490 U.S. 401, 411-12 (1989).

The second step in the procedural due process analysis is determining whether the deprivation "contravened notions of due process." *Warren*, F.3d at 709. "The determination of what due process requires in a given context depends on a consideration of both the nature of the governmental function involved and the private interests affected." *Mitchell*, 416 U.S. at 624.

A. Petitioner Possesses a Liberty Interest in not Associating with a Union Improperly Certified under the NLRA.

Here, Petitioner has a liberty interest in its right not to associate with the union at issue in this lawsuit. *See Wooley v. Maynard*, 430 U.S. 705 (1977) (First Amendment rights include the right *not* to speak); *Otto v. Pa. State Educ. Ass'n*, 330 F.3d 125, 128 (3d Cir. 2003) (recognizing an individual employee's First Amendment "freedom not to associate with a labor organization"); *see also Fiske v. Lockheed-Georgia Co.*, 568 F. Supp. 590, 592 (N.D. Ga. 1983) (noting that a private company asserted a "first amendment right not to associate with a union," and rejecting its arguments on unrelated grounds). The Sixth Circuit used an incorrect legal standard that contradicts published authority and deprived Petitioner of its First Amendment right not to associate with the union based on an improper certification of an exclusive bargaining representative for store employees under the NLRA. The Sixth Circuit also impinged on the Section 7 rights of employees at the Glen's Market Store who are entitled to an election procedure free from misconduct that has a reasonable tendency to coerce. The panel's decision not only extinguishes Family Fare's liberty interest but fails to protect the very statutory rights that the NLRA was enacted to protect.

B. The Sixth Circuit Deprived Petitioner of Due Process by Failing to Follow Prior Published Authority or Granting *En Banc* Review as Required by Circuit Rule 206.

With regard to the second step of the procedural due process analysis, the Sixth Circuit deprived Petitioner of its liberty interest without affording it the protection of the

procedure already in place within the Sixth Circuit Court of Appeals. The "process due" Petitioner included faithful application of Circuit Rule 206 which required the Sixth Circuit to either follow its prior published opinions or grant en banc review. It did neither.

Although the deprivation of an individual's property rights does not ordinarily violate the constitutional guarantee of procedural due process if the individual is afforded notice and a hearing, this lawsuit does not concern an individual's property interest. Thus, the "determination of what due process requires" in this context, "depends on a consideration of both the nature of the governmental function involved and the private interests affected." *Mitchell*, 416 U.S. at 624.

In *Mitchell*, the Petitioner, a debtor that owed the Respondent for the goods at issue, argued that the state sequestration statute violated its right to the uninterrupted possession of its property. To determine whether the sequestration statute afforded sufficient procedural due process, the court looked to the "nature" of the governmental function behind the statute, namely "to protect the legitimate interests of the creditor and debtor." *Id.* The Court then balanced that interest against the "debtor's real interest in uninterrupted possession of the goods," and determined that the sequestration statute provided sufficient due process protections. *Id.* at 625.

Here, the Sixth Circuit stripped Petitioner of its right to the procedural protection afforded by *en banc* review of decisions that overrule, modify or contradict prior, published opinions. 6th Cir. R. 206(c). Applying the same balancing test that this Court used in *Mitchell*, shows that the governmental function behind the court's interest in issuing an unpublished decision cannot outweigh Petitioner's legitimate

constitutional interests in receiving faithful application of the court's own rule.

The governmental function behind permitting courts to issue unpublished opinions appears to be the court's interest in efficiently managing its congested docket and offering parties a quick resolution of disputes. "We do not have time to do a decent enough job, the argument runs, when put in plain language, to justify treating every opinion as a precedent." *Anastasoff*, 223 F.3d at 904; *see also Hart v. Massanari*, 266 F.3d 1155, 1177 (9th Cir. 2001) (arguing that the Circuit Courts of Appeal must be allowed to hand-pick which cases become precedent, because "few, if any, appellate courts have the resources to write precedential opinions in every case before them").

This interest, however, is irrelevant and not implicated here. To provide Petitioner and other litigants procedural due process, the Sixth Circuit simply had to follow its prior published authority or grant *en banc* review before changing and applying a new legal standard to Petitioner's case. Any efficiency interests in published versus unpublished decisions are not impacted because the court could just as easily have applied the prior published controlling legal standard in its unpublished opinion.

Petitioner was deprived of its First Amendment right not to bargain with the proposed union by a Sixth Circuit panel opinion, which held that, during the administrative hearing below, Petitioner was required to submit evidence of actual coercion when prior published opinions from the same Court have held that no such showing is required. Petitioner has both the First Amendment right not to associate with unions, and a Fifth Amendment due process right to fair adjudication of its claims through the common law system in place within

the United States Federal Courts. Petitioner also has the right to rely on the well settled precedent and published rule of the Sixth Circuit Court of Appeals requiring *en banc* review before the court (including any panel) arbitrarily contradicts or disregards the circuit's own published precedent.

The court cannot violate a litigant's due process rights under these circumstances simply because the Court wishes to issue an unpublished opinion that escapes *en banc* scrutiny. In other words, it cannot sweep an impermissible modification of prior published authority "under the rug" by putting the change or modification in an unpublished decision. Such action, as in this case, violates the court's own procedural rule and denies the litigants due process and equal protection.

III. The Sixth Circuit Exercised Non-Judicial Power in Violation of Article III When it Arbitrarily Determined that its Decision Would be Non-binding Precedent.

This Court has clear authority to review the constitutionality of a lower court's local rules because the lower court's rule making powers derive from, and are narrowly limited to, the power to manage their "practice" and "conduct . . . their business," as vested in them by Congress and described in the Federal Rules of Appellate Procedure. 28 U.S.C. § 2071(a); Fed. R. App. P. 47(a). The lower courts may not exceed the power vested in them to control the proceedings before them through the adoption of local rules, and certainly may not adopt unconstitutional local rules. *See Frazier v. Heebe*, 482 U.S. 641, 645-46 (1987) (holding that the U.S. Supreme Court "may exercise its inherent supervisory power to ensure that . . . local rules are consistent with the principles of right and justice. . . ." (internal quotations omitted)).

As explained above, the Sixth Circuit's disposition of the case below deprives Petitioner of equal protection and due process. These constitutional violations hold true under the assumption that the Sixth Circuit had the authority under its rules to designate which of its decisions will be published and which will be unpublished -- with no precedential value. There is, however, a split among federal circuits on whether federal courts may constitutionally designate any opinion published or unpublished as having no precedential value.

For instance, in *Anastasoff*, the Eighth Circuit held that a court exceeds the judicial power vested in it by Article III of the Constitution by deciding which opinions should become published, binding precedent and which should not. *Anastasoff*, 223 F.3d at 905. The Ninth Circuit has disagreed. *Hart v. Massanari*, 266 F.3d 1155, 1177 (9th Cir. 2001).

Although the Ninth Circuit, in an opinion written by Judge Kozinski, disagreed with the court in *Anastasoff*, other judges and law review articles which have examined this circuit split, agree that rules, like Sixth Circuit Rule 206, are unconstitutional. *Compare Hart*, 266 F.3d at 1177 *with State v. Uyesgi*, 60 P.3d 843, 879-80 (Hawaii 2002) (Acoba, J. & Ramil, J., concurring); Vincent M. Cox, Freeing Unpublished Opinions From Exile, 44 WASHBURN L.J. 105, 119 (2004); Jon A. Strongman, Unpublished Opinions, Precedent, and the Fifth Amendment, 50 U. KAN. L. REV. 195 (2001). The *Anastasoff* court implicitly held that by hand-picking which cases would bind future parties, the Court of Appeals was exercising legislative, and not judicial power, and thereby violating the separation of powers. *Anastasoff*, 223 F.3d at 905. The unpublished opinion rule "expands the judicial power beyond the limits set by Article III by allowing

us complete discretion to determine which judicial decisions will bind us and which will not." *Id.*

Although the Federal Rules of Appellate Procedure have recently been amended to prohibit any court from limiting a party's right to cite an unpublished opinion, both *Anastasoff* and scholars agree that the problem with rules, such as Sixth Circuit Rule 206, is not one of citation or publication, and thus has not been repaired by the new federal rule. *See* Fed. R. App. P. 32.1. "The question presented here is not whether opinions ought to be published, but whether they ought to have precedential effect whether published or not." *Anastasoff*, 223 F.3d at 904. "Unfortunately, the furor over the new citation rule has overshadowed a more important and divisive issue – whether it is appropriate for appeals courts to designate some (in fact, most) of their decisions as nonprecedential." Scott E. Gant, Missing the Forest For A Tree: Unpublished Opinions and New Federal Rule of Appellate Procedure 32.1, 47 B.C. L. REV. 705 (2006).

The Sixth Circuit exceeded its judicial power and violated Article III of the Constitution when it enforced the NLRB order below in an unpublished opinion. This is an additional basis upon which the Court should find that the panel opinion in this lawsuit must be remanded and submitted for *en banc* review or reheard under the correct controlling legal authority.

CONCLUSION

For the reasons stated above, Petitioner Family Fare LLC respectfully asks that the Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit and to remand the case for the lower court to rehear the case under correct legal standards and

controlling published authority, or consider the case *en banc* before overruling such authority.

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